Nortech Waste *and* Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO. Cases 20–CA–28057, 20–CA–28378, and 20–CA–28432

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On, May 14, 1999, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions, a supporting brief, and a brief in reply to the cross-exceptions. The General Counsel, joined by the Charging Party, filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order as modified below.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions have been filed to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by barring union employees from a nonpublic area of its plant, Sec. 8(a)(3) by changing employee Alice Keyes' hours to accommodate "tailgate meetings," and Sec. 8(a)(5) by failing to bargain with the Union over its IRCA compliance policies. No exceptions were filed to the administrative law judge's findings that the Respondent violated Sec. 8(a)(1) by soliciting employee grievances through its mandatory "tailgate meetings," Sec. 8(a)(3) by warning employee Alice Keyes, and Sec. 8(a)(5) by dealing directly with employees by soliciting grievances at "tailgate meeting," and by unilaterally changing its safety equipment replacement and sick leave policies.

[2] We agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) by failing to reinstate unfair labor practice strikers promptly after an unconditional offer to return to work. Contrary to the judge's finding, the Respondent's assistant general manager, Larry Buckle, called an employment agency seeking replacement workers, not its general manager, Jerry Jackson. The Respondent concedes in its brief that it was willing to permit the strikers, upon the offer to return, to begin work immediately, if, inter alia, they and the Union would abandon the claim that Keyes and Jara had been unlawfully suspended. Thus, we agree with the judge that the Respondent attached unlawful conditions—relinquishing the vindication of Sec. 7 rights—to the reinstatement of the strikers. The Respondent thereby lost the accommodation of the "grace period" described by the judge.

We modify the judge's Conclusion of Law 9 to reflect that the Respondent violated Sec. 8(a)(3) and (1) by reassigning Alice Keyes from her position as a garbage sorter to the green line and cleanup duties on January 5, 1998, and Conclusion of Law 10 to reflect that the Respondent assigned Keyes to pull nails from boards on January 20, 1998.

With regard to these conclusions of law, we find merit in the General Counsel's exception to the judge's failure to order that the Respondent offer Alice Keyes reinstatement to her former position on the main sorting line, in accordance with the Americans with Disabilities Act and other applicable laws, if and when she recovers from her injuries and is released by her doctor to perform the required duties, and that she be made whole for any loss of pay and benefits as a result of the unlawful reassignment. We shall modify the remedy, recommended Order, and notice accordingly.

The judge recommended that the Respondent be ordered to make Keyes whole for any medical expenses she incurred as a result of her unlawful reassignment. We shall leave the question of whether Keyes should be made whole for medical expenses to the compliance stage of this proceeding.

The Respondent has excepted to the award of medical expenses. The Board has previously been reluctant to award reimbursement for consequential medical expenses, stating that medical expenses "are better sought through private remedies traditionally used for the recovery of such damages." *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 fn. 5 (1986). The Board has acknowledged that state courts "have more experience and are better equipped than the Board to measure the impact of tortious conduct." Id. *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963). However, in *Pilliod of Mississippi*, 275 NLRB 799 fn. 3 (1985); and *Lee Brass*, 316 NLRB 1122 fn. 4 (1995), enfd. mem. 105 F.3d 671 (11th Cir. 1996), the Board did not deny the requested reimbursement of medical expenses, but instead provided for the customary make-whole remedy, specifically leaving to the compliance stage of the proceeding the question of whether the employees incurred medical expenses attributable to the respondents' unlawful conduct. In the exercise of our remedial authority, we find it appropriate to follow the same procedure here.

The policy behind our prior reluctance to award medical expenses is rooted in the recognition that state tort remedies are available for personal injuries, and that "such items as medical expenses and pain and suffering, could be more readily and comprehensively remedied in state tort actions than in Board proceedings." *Iron Workers Local 111 (Northern States)*, 298 NLRB 930, 932 (1990), enfd. 946 F.2d 1264 (7th Cir. 1991). See also *Long Construction*, supra, 145 NLRB at 556. Here, however, those concerns are not implicated. Unlike nonspecific damages such as pain and suffering, the medical expenses sought to be reimbursed here are not speculative. Rather, they are specific and easily ascertained. Thus, the special expertise of the State courts in determining speculative tort damages is not required in this case. We therefore find under these limited circumstances that it would better effectuate the policies of the Act to leave to the compliance stage, as we did in *Pilliod of Mississippi*, supra, and *Lee Brass*, supra, the question of whether Keyes incurred medical expenses (as defined herein), and if she did, whether they should be reimbursed.

We note that in *Graves Trucking, Inc.*, 246 NLRB 344 (1979), modified 692 F.2d 470 (7th Cir. 1982), cited by the judge, the issue of reimbursement of medical expenses was not before the Board.

[3] We will modify the judge's recommended Order in accordance with *Ferguson Electric Co*., 335 NLRB 142 (2001).

gration and Naturalization Service (INS), and based thereon terminated the employees. The record provides no support for the Respondent's exceptions. In rejecting them, we do not minimize the importance of employer compliance with IRCA, but we agree with the judge that the Respondent used IRCA as a smokescreen to retaliate for and to undermine the Union's election victory. In agreeing with the judge, we find that the Respondent's response to questions about employees' eligibility to work in the aftermath of the election significantly departed from its ordinary course of business as it pertained to IRCA matters. This deviation from usual practice further supports the finding that the Respondent discharged the employees in violation of Section 8(a)(3) and (1).

The relevant evidence, set out briefly, is as follows. The Respondent assigned responsibility for IRCA matters to human resources officer Sally Punkar. She testified that the Respondent always includes documents verifying eligibility to work in the employment packages for prospective hires, requires every new hire to execute an INS I–9 form and supporting documentation, and assumes, in keeping with IRCA requirements, that facially accurate documents are valid. Punkar testified that the Respondent's records respecting eligibility to work were in order when the events at issue occurred. The Respondent's general manager, Jerry Jackson, had, before the election, limited his involvement with immigration matters to occasional inquiries about the Respondent's files and the assumption that if serious problems arose, Punkar would inform him. Jackson testified that several times before the election on September 24, 1997, individuals had suggested to Jackson that the Respondent employed undocumented workers. He had never taken these rumors further than mentioning them to Punkar, who had assured him that the Respondent's files were in order.

Jackson testified that after the election he was again approached with the suggestion that the Respondent employed ineligible workers, and that the Union's victory in the election was unfair because these individuals had voted. A few days after the election, Jackson found on his desk an unsigned, handwritten list of Hispanic names, without notation.[4] He purportedly concluded that the listed employees were working illegally, that the list had been supplied by an unknown individual dissatisfied with the union victory, and that "he had to do something." He began an immediate and unprecedented personal review of the employees' files. He testified that when the first file he examined appeared "suspicious," he called the local INS office, and an agent told him that one option available to the Respondent would be to ask employees about their eligibility and tell them to check with the INS. On October 1, the Respondent filed objections to the election, asserting that 19 employees (actually 11) eligible to vote in the election "have, this date, terminated their employment from the employer, because of their inability to prove . . . that they are legal and qualified to work in this country," leaving the "true results" of the election in doubt. The same day, Punkar, at Jackson's direction, told 11 employees that their eligibility to work was in doubt, that the INS had been contacted, and that they had 3 days to straighten their paperwork out, and issued them final checks.[5] The employees returned to work on October 14, although they did not further verify their status.

These facts demonstrate Jackson's complete departure from the Respondent's customary manner of doing business and the implausibility of the Respondent's argument that it was merely trying to comply with the immigration laws. The record shows that the Respondent had delegated immigration matters to Sally Punkar and her staff, who maintained an orderly system of fulfilling the Respondent's duties under IRCA. There is no evidence that Jackson had ever criticized or found fault with Punkar's execution of her duties. After the election, however, Jackson bypassed usual procedures and his personal past practice and delved into a complex area of law in which he lacked any experience, in a manner that does not appear to be consistent with a good-faith effort to comply with the law. In this regard, there is no evidence that Jackson's conduct revealed problems with the Respondent's IRCA procedures or led to any review or alteration of them. Further, Jackson's account of his conversation with the INS agent belies the argument that the Respondent was just trying to follow INS directives. His testimony does not indicate that the agent provided a mandate, or indeed any basis at all, for discharging suspected employees.[6] Thus, these facts, in addition to the facts set out in the judge's decision, strongly supports the judge's finding that undermining the Union's victory was the real reason for the discharges. For these reasons, as well as those stated by the judge, we find that the discharges violated Section 8(a)(3) and (1) of the Act.[7]

[4] No other witness testified to having seen the list, and the Respondent could not produce it for the hearing.

[5] A second list of Hispanic names, also handwritten, anonymous, and unlabeled, appeared a few days later, but questions about the status of employees on the second list were dropped.

[6] Wendy Swinford, an accounts receivable clerk, also spoke to the INS office. She did not testify.

[7] Our dissenting colleague asserts that the Respondent did not discharge these 11 employees. The evidence shows that the Respondent put these employees out of work. The test for determining whether an employee has been discharged does not depend on the use of formal words but on the reasonable inference that the employees could draw from the language used and the action taken by the employer. *NLRB v.*

2. In its exceptions to the judge's finding that it violated Section 8(a)(3) and (1) by suspending employees Olga Jara and Alice Keyes, the Respondent asserts, inter alia, that General Manager Jackson acted in a good-faith belief that Olga Jara had punched Alice Keyes' timecard, and that the judge ignored its argument that it suspended the employees in part because they were "dishonest" during the investigation of the purported violation of its rules governing employees' timecards. We find no merit in the Respondent's exceptions.

Keyes and Jara were known union supporters and activists, and Keyes served on the negotiating committee. Keyes had previously been warned, in violation of Section 8(a)(3) and (1), for her protected concerted activity at employee meetings held by the Respondent.[8] Keyes and Jara were informed that their conduct was under investigation on November 24, 1997, the first workday after November 21, on which date negotiations with the Union had begun and on which date Keyes and Jara had engaged in protected concerted activity at an employee meeting. Thus, the General Counsel has established a strong prima facie case that the discipline of the two employees was based on their union and protected activities. Further, the Respondent has failed to rebut the General Counsel's case by showing that it would have suspended the employees even in the absence of their protected conduct. In this regard, we find that even if Jara had punched Keyes' timecard and thereby disobeyed a work rule, as the Respondent contends, the Respondent has failed to demonstrate that it enforced the rule consistently, and the judge credited testimony that reports of possible violations were ignored. Further, in its brief the Respondent tacitly concedes the judge's finding that even if Jara punched her coworker's timecard, the policy was not violated. The Respondent quotes the policy's relevant language as follows: "[this system] can't prevent an employee from *clocking in another who is either late for work or absent for the day*." [Emphasis added]. Keyes was neither "late for work" nor "absent for the day." Thus, the judge correctly found that no violation of the policy occurred. The record further shows that the Respondent's investigation into Jara and Keyes' conduct lacked the marks of a fair-minded effort to arrive at the truth. The Respondent was unable to name any witness who saw Jara punch both cards, and its witnesses at the hearing were unable to testify that Keyes was not in the area at the time the card was punched. Although Buckle testified that he thoroughly investigated the statements against Jara and Keyes, the record strongly indicates that the investigation's goal was to provide a plausible basis for imposing adverse action.

These facts belie the Respondent's assertion that the investigation and suspension were based on a good-faith belief that Jara and Keyes broke its timecard rule. They indicate instead that, as the judge found, the real purpose for the investigation and discipline was to retaliate against the employees for their union and protected conduct, and that the reasons for the suspension advanced by the Respondent were pretextual.

We also reject the Respondent's contention that its belief that Jara and Keyes had been dishonest in denying that they broke the rule was a second basis for the suspensions. The record contains no evidence that the Respondent had previously disciplined any employees because they had wrongly denied engaging in misconduct. Thus, in light of the retaliatory and discriminatory purpose of the underlying investigation, this additional justification for suspending Jara and Keyes provides an insufficient basis for finding that the Respondent has rebutted the General Counsel's prima facie case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders the Respondent, Nortech Waste, Roseville, California, its officers, agents, successors, and assigns, shall take the action in the recommended Order as modified.

1. Insert the following paragraph 2(e) and reletter the following paragraphs.

"(e) Offer Alice Keyes, at her request, reinstatement to her former position on the main sorting line, if and when she recovers from her injuries and her doctor releases her to perform her sorting duties, consistent with the requirements of the Americans with Disabilities Act and other applicable statutes."

2. Insert the following paragraph 2(f) and reletter the following paragraphs.

"(f) Make Alice Keyes whole, with interest, for any other loss of pay and benefits she may have suffered as a result of the unlawful reassignment."

3. Substitute the following for paragraph 2(i).

"(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payments records, timecards, personnel records, and reports, and all other records, including an electronic copy of such records if stored in electronic

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Hale Mfg. Co., 570 F.2d 705, 708 (8th Cir. 1978). Here, the Respondent told the employees that they had to contact the IRS and that they could not work in the meantime. At least some of the employees' paychecks were marked "final check." In light of these facts, we find that the only reasonable conclusion these employees could draw is that they had been discharged.

[8] The Respondent has not excepted to this finding.

form, necessary to analyze the amount of backpay due under the terms of this Order."

4. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN HURTGEN, dissenting in part.

My colleagues find that the Respondent violated Section 8(a)(3) and (1) by discharging 11 employees on October 1. I disagree.

First, I find no discharge on October 1. The judge found that on October 1, 1997, the Respondent informed the employees at issue that the INS had been contacted, and that they had 3 days to straighten out their paperwork with the INS. In the meantime, they could not work. No affected employee testified that he had been discharged. Respondent agents Jackson and Punkar testified that no one was discharged.

I recognize that on October 1 the Respondent filed objections to the September 24 election, stating that it had terminated the employees because it had discovered that their claim of eligibility to work in the United States was flawed. However, on October 9, the Respondent withdrew its objection. The employees returned to work on October 14.

I find these facts insufficient to establish that the employees at issue were discharged on October 1. Indeed, the judge admitted that it was unclear whether any employee was discharged. The Respondent told the employees on October 1 that they had to straighten out their status with the INS. The clear implication was that, absent a satisfactory resolution with INS, they *would be* discharged. But, this is not to say that they were discharged on October 1.

I also note that the Respondent, on October 8 and 10, sent letters to the affected employees stating, inter alia, that they should advise the Respondent as to whether they would return to work on October 14 and that if they needed more time (i.e., beyond October 14) the Respondent would accommodate them.

Concededly, the employees were not allowed to work in the interim period. But, this is not to say that they were discharged at the outset of the interim period, i.e., on October 1. Indeed, as noted, they returned to work on October 14.

As noted, the Respondent filed an objection on October 1, stating that the employees were terminated on that day. However, the objection was withdrawn on October 9. In these circumstances, I would look to the facts, rather than to an assertion in a withdrawn objection. In my view, the facts do not establish a termination. At most, they show an ambiguity on the issue.

I agree with my colleagues that whether an employee has been discharged does not depend on the use of formal words. For the reasons stated, above, I find that the employees here would not reasonably have inferred that they were discharged. Further, contrary to my colleagues, an employee who is put "out of work" is not necessarily discharged. Suspension and layoff, for example, are not discharges.

In the alternative, even if the employees were discharged on October 1, I conclude that the Respondent acted lawfully. In my view, the Respondent was caught between a rock and a hard place. The Respondent was confronted with an anonymous note, left on Jackson's desk, suggesting that certain employees were not legally in the U.S. There is no evidence that this had happened before. In the face of this information, the Respondent would risk violating immigration laws if it did nothing. Thus, the Respondent did the prudent thing. It called INS and asked what to do. The INS agent suggested that the Respondent tell the employees to check with INS. That is precisely what the Respondent did.

My colleagues minimize the dilemma in part by finding that the INS did not mandate the alleged discharges. But the Respondent does not contend that the INS mandated any discharges. The Respondent contends only that the INS made suggestions and that the Respondent followed these suggestions.

My colleagues emphasize that the Respondent handled this particular immigration matter differently from the way it had handled previous ones (i.e., Jackson, not Punkar, took the lead). But, as noted above, that is because the situation was without precedent. Further, the letters sent by the Respondent to the employees at issue name Punkar as the person the employees should contact, and state that if an employee needed additional time, beyond October 14, he should report to work, and Punkar would be able to accommodate him.

Sure-Tan v. NLRB, 467 U.S. 883 (1984), is distinguishable. In that case, the employer, for antiunion reasons, called the INS and caused the termination of the employees. In the instant case, in order to avoid INS sanctions, the Respondent called the INS and asked the agency what to do. In this regard, I note that the Immigration Reform and Control Act (IRCA), which postdates *Sure-Tan*, prohibits an employer from hiring an illegal alien or from continuing to employ someone it has learned is an illegal alien. The Respondent, confronted with the claim that its work force included illegal aliens, reasonably and appropriately contacted the INS, and followed that agency's advice. Had it ignored the matter, it would have risked huge fines.

In these circumstances, and for all of the reasons mentioned above, I would dismiss this allegation.[1]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit grievances, during "tailgate" or other meetings, from our employees in order to interfere with their desire for union representation.

WE WILL NOT give warnings to our employees intended to interfere with their activity for and on behalf of fellow employees or because the employee is believed to be a union activist.

WE WILL NOT terminate employees to retaliate against them because of the outcome of a representation election or to undermine the validity of that election.

WE WILL NOT suspend employees because of their union activities.

WE WILL NOT refuse to accept the unconditional offer of unfair labor practice strikers to return to work.

WE WILL NOT ask the International Union of Operating Engineers, Local Union No. 3, AFL–CIO to withdraw any unfair labor practice charges it filed on behalf of employees as a condition of discussing the return of unfair labor practice strikers.

WE WILL NOT isolate any employees so that they cannot engage in activity protected by Section 7 of the Act.

WE WILL NOT assign union activists to unnecessary tasks or tasks which unreasonably risk injury, such as manually pulling nails from used lumber, as a device for getting rid of such employees.

WE WILL NOT breach our duty to bargain in good faith with the certified union, the International Union of Operating Engineers, Local Union No. 3, AFL–CIO, by making unilateral changes which affect our employees' wages, hours, or terms and conditions of employment.

WE WILL NOT bypass the International Union of Operating Engineers, Local Union No. 3, AFL–CIO, the certified Union, or deal directly with our employees concerning wages, hours, or terms and conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the warning given to Alice Keyes on August 29, 1997.

WE WILL make whole Juan Campos, Luis Cassillas, Rigoberto Contreras, Lazaro Gomez, Imelda Gonzalez, Carlos Guzman, Martha Herrejon, Ricardo Ramirez, Luis Rodriguez, Veronica Rodriguez, and Beatriz Saavedra, with interest, for their illegal discharge on October 1, 1997.

WE WILL make whole Olga Jara and Alice Keyes for their illegal suspension, which began November 28, 1997, with interest.

WE WILL offer Alice Keyes, at her request, reinstatement to her former position on the main sorting line, if and when she is released by her doctor to return to her sorting duties, consistent with the requirements of the Americans with Disabilities Act and other applicable statutes and WE WILL make Alice Keyes whole for any loss of pay and benefits she may have suffered as a result of the unlawful reassignment.

WE WILL make whole the unfair labor practice strikers, with interest, for work lost as a result of our failure to reinstate them promptly on December 4, 1997.

WE WILL rescind the changes in working conditions we made unilaterally and without notifying the International Union of Operating Engineers, Local Union No. 3, AFL–CIO.

WE WILL make whole any employee for benefits lost as a result of the unlawful unilateral changes.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful warnings of Alice Keyes, suspensions of Alice Keyes and Olga Jara, and illegal discharges of Juan Campos, Luis Cassillas, Rigoberto Contreras, Lazaro Gomez, Imelda Gon-

[1] I agree with the judge and my colleagues that the Respondent unlawfully reassigned Alice Keyes. I do so only because I find that the General Counsel established a prima facie case and Respondent failed to show that the reassignment comported with the business reasons cited by Respondent. Although Respondent had a valid business reason for removing her from the position, which she held, it had no such reason for assigning her where it did. I find that the Respondent chose to isolate Keyes from other employees without establishing a valid business reason for placing her where it did. In view of the above, I would not require the Respondent to restore her to her former position. In my view, she could lawfully be placed elsewhere if that were done for valid business reasons.

zalez, Carlos Guzman, Martha Herrejon, Ricardo Ramirez, Luis Rodriguez, Veronica Rodriguez, and Beatriz Saavedra, and notify the affected employees in writing that this has been done and that the discipline will not be used against them in any way.

NORTECH WASTE

Shelley Brenner, Esq., for the General Counsel.
Mark D. Jordan, Esq. (Bernheim & Hicks), of Santa Rosa, California, for Respondent.
David A. Rosenfeld and *Matthew J. Gaugher, Esqs. (Van Bourg, Weinberg, Roger & Rosenfeld),* of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Sacramento, California, on June 16–19, 1998, pursuant to a consolidated complaint issued by the Regional Director for Region 20 of the National Labor Relations Board on January 30, 1998. The consolidated complaint is based on unfair labor practice charges originally filed by Operating Engineers Local 3, International Union of Operating Engineers, AFL–CIO on October 3, 1997, March 24 and April 22, 1998, although some were subsequently amended. The consolidated complaint alleges that Respondent Nortech Waste has violated Section 8(a)(1), (2),[1] (3), (4), and (5) of the National Labor Relations Act (NLRA) in a variety of ways. Moreover, paragraphs 11 and 14 of the complaint underwent some amendment at the hearing. Respondent denies the commission of any unfair labor practices.

Issues

The case is concerned with the conduct of this Respondent as it reacted to a successful union organizing campaign in the fall of 1997 through March 1998. On September 24, 1997, a representation election was conducted which the Union won; it was subsequently certified as the Section 9(a) exclusive collective-bargaining representative of the unit employees. Prior to the election it is alleged to have violated the employees' Section 7 rights, by instituting weekly meetings where it solicited grievances and made implied promises designed to dissuade employees from union representation. After the election it is alleged to have committed large numbers of violations, all seeming to the General Counsel to be reprisals for having selected the Union as their representative.

These unfair labor practices include allegations that organizing leaders Alice Keyes and Olga Jara were suspended, that Keyes was unlawfully given a warning and subsequently given more onerous duties, that breaches of the bargaining obligation occurred such as direct dealing (grievance solicitation) and unilateral changes, including layoffs (also separately alleged as an 8(a)(3) violation), failing to bargain over layoff procedures, an allegedly unlawful refusal to promptly reinstate putative unfair labor practice strikers, and making a proposal to bring back the strikers which the General Counsel asserts, in violation of Section 8(a)(4), required the Union to withdraw its unfair labor practice charges as a condition for their return.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation, which operates a waste recycling facility in Roseville, California. In the course of that business, it annually provides services valued in excess of $50,000 directly to other business entities each of which meet the applicable Board standards for the assertion of jurisdiction on a direct basis. Respondent therefore admits, and I find it to be, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits the Union is a labor organization within the meaning of Section 2(5) of the Act and I so find.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Western Placer County Waste Management Authority owns a landfill near Roseville. Respondent has leased from the Authority a recently built recycling plant, which is contiguous to the landfill. The purpose of the plant is to extract recyclable material and sell it on the open market. To accomplish this purpose it runs two types of sorting lines. The one that requires the most workers is the garbage line in which all types of refuse may be found. The second, much smaller, is "green waste" line, which consists of yard and landscape clippings, including logs and used lumber.

The waste is brought into the facility and placed on the dump floor. From there it is placed on the sorting lines, which are conveyor belts. Sorters then manually pick recyclable items off the lines and place them in the appropriate bin or "hole." Waste not deemed appropriate for recycling is sent to the landfill. There are roughly 45–55 sorters in the main operation, while the green waste line normally has only four. The green waste sorters remove material, which cannot be chipped or composted.

In addition to the sorters, Respondent employs at least two drivers; about six fork lift drivers; around six mechanics, some of whom are helpers and others of whom are welders; office clericals; and a management staff of supervisors and team leaders. The managers include Jerry Jackson, the general manager; an assistant general manager, Larry Buckle (whose first day of work was September 22, 1997, only 2 days before the NLRB election); Supervisor Bill Thornbirg; Lilia Clement, a sorter team leader; and Carl Speaker, an assistant sorter team leader. Stan Nader is the supervisor of the green waste line. The Company operates the sorting lines during the day from 7 a.m. to 3:30 p.m. It also

[1] In her brief, counsel for the General Counsel has moved to withdraw the 8(a)(2) allegation. That motion is granted as the alleged illegal assistance to the Nortech Employees Association occurred with concurrence of the Charging Party.

[2] The incidents occurred during a period covering the summer of 1997 through the spring of 1998. Par. 12 of the complaint erroneously refers to dates in 1998, an obvious typographical error. It should have been 1997. No party claims prejudice from the error and the matter was properly litigated.

operates a swing shift in the afternoon and evening where maintenance work is performed.

The Union had attempted to organize the facility in 1996 but had failed. In July 1997, Keyes, Jara, and other sorters began soliciting union authorization cards to support a second organizing effort. Signs were posted on the employee bulletin board about having union organizing meetings at her home. Union officials came to her home, where they met twice with as many as 30 employees. Keyes did no soliciting at the plant because she had recently undergone some surgery and was off work during this phase. As a result, Jara and fellow employee Angela Chavez were the principal solicitors. The cards were given to Keyes who turned them in to the Union. According to Keyes, the main issue was safety on the job.

Election Petition; March on the Boss

According to Thomas R. "Bob" Miller, the Union's director of organizing, in late July or early August, the Union both filed an election petition with the Board as well as a demand for recognition. When Respondent did not reply, on August 5, it held its first demonstration, known as the "March on the Boss." At 11 a.m. that day, lunch hour, Miller, together with two other union representatives and approximately 50 employees, including Jara and Keyes,[3] gathered in front of the main office and went into the foyer demanding to see Jackson. Eventually Jackson appeared and Frank Herrera, a union district representative from Marysville, asked Jackson for recognition. Jackson at first refused to meet with anybody but the union officials. Miller describes what happened next:

> He [Jackson] refused to speak with us in front of all the employees. He threatened to call the police, which he did, he threatened to have us forcibly removed from the premises. We asked him if he would give us recognition and he refused. And we asked him why and he did not answer that question. And Frank Herrera presented him with a list of safety demands which he refused to address. He also said, "I don't need you guys. We don't need you guys. Nobody needs you guys." And he also said, "Let me inform you we already have an internal union started."

Herrera testified that he tried to read the list of safety issues to Jackson, but Jackson walked away. He also tried to deliver it to another company official, but had no luck. There were about 30 copies of the list of safety demands and many were given out that day. Eventually, the police arrived, and the union officials issued the employees union pins and stickers which many of the employees put on.

B. Jackson's Response

On August 6, the day after the March on the Boss, Jackson called for a meeting of the entire staff, except that it was to be broken into four small meetings. Keyes, now the recognized leader of the employees, told Clement that the employees wanted one big meeting. Clement agreed to transmit that to Jackson, and returned a short while later saying that the meetings had been canceled. Three days later, on August 8, Respondent initiated what it calls "tailgate" meetings that were thereafter held every Friday. The General Counsel asserts that these types of meetings are "new." Jackson asserts they are not, saying they had the same purpose as the safety meetings that had been held monthly from September 1996 until February 1997.

At the first "tailgate" meeting the speakers were team leader Lilia Clement and her assistant, Carl Speaker, rather than the safety officer, Tim Willette, who had conducted the safety meetings. Respondent concedes both Clement and Speaker are 2(11) supervisors and Respondent's agents within the meaning of Section 2(13) of the Act. Keyes reports that Speaker advised that the purpose of the meeting was to talk about problems, safety or any other issues which employees wanted to bring up. Both Clement and Speaker took notes.

Keyes recalls that one complaint was that the pallets on which the employees were obliged to stand on were broken and dangerous. A few days later new pallets were brought in. At least one of the women complained that there was insufficient notice given for mandatory Saturday work. Apparently notice was given so late on Fridays that it was difficult to make child care arrangements. The practice was modified a few days later. One complained about being whistled at by Clement as if he were a dog. She apologized and said she wouldn't do it any more.

Subsequent tailgate meetings were also conducted in this vein. It is clear that they are quite unlike the safety meetings. They were held four times more frequently and were not focused solely on safety as Jackson says Willette had. Clearly Jackson is incorrect in his assertion that the "tailgate" meetings served no different function than the monthly safety meetings conducted by the safety officer. I think it is clear that the format of these meetings was designed, instead, to address those problems, which had caused the employees to go to the Union. Their purpose was to try to deter employees from seeking union representation by soliciting complaints so they could be resolved. Such an effort clearly violates Section 8(a)(1) of the Act. *Heartland of Lansing Nursing Home*, 307 NLRB 152, 156 (1992); *Varco, Inc.*, 216 NLRB 1 (1974); and *Reliance Electric*, 191 NLRB 44, 46 (1971).

C. August 29 Warning to Keyes

Keyes, as previously noted, had returned to work on July 28 after her surgery. The doctor's slip limited her to 8 hours work per day. Although, as noted above, the sorters' normal hours are from 7 a.m. to 3:30 p.m., for reasons not clear in the record, Keyes was initially assigned to a slightly earlier shift, 6:30 a.m. to 3 p.m. Thus, when the tailgate meetings began at 3 p.m., unlike most of the sorters, she had completed an 8-hour day. Under Respondent's policy, and perhaps State law in effect when Respondent commenced business, employees who worked more than an 8-hour day were entitled to the overtime rate, time and a half.

On August 27 Clement advised Keyes that supervisor Thornbirg had directed her to change Keyes's hours to be the same as the other sorters, 7 a.m. to 6:30 p.m. Clement's explanation regarding overtime made no sense to Keyes, and I think it is likely that Clement did not understand it very well herself, at least if one accepts Keyes's version. Keyes later asked Speaker about it, but he knew even less. As a result, she continued to complain,

[3] Keyes had come back to work on July 28, even though not at full strength.

asserting that it was a retaliation for her union activities.[4] This led to a meeting on August 29 with Thornbirg, Clement, and Speaker. Keyes acknowledges that she approached the meeting with less than an equable manner. She admits sarcastically saying to Thornbirg, "Well, it's nice to meet my supervisor after being back a month." (Thornbirg had been a mechanic when she went on medical leave, and had been appointed supervisor during her absence.)

During the meeting Thornbirg not only explained his reasons for the change, he first referred to her doctor's note limiting her to an 8-hour day and then gave her a written memo. (GC Exh. 11). In its entirety the memo says:

> Nortech Waste's regular working hours for the Processing Department are Monday through Friday 7:00 a.m. to 3:30 p.m.
>
> Since you are limited to working only 8 hours per day because of your medical condition, I would prefer you work the above hours so you may attend any meeting that we schedule at 3:00 p.m.

After that occurred, according to Keyes, both Clement and Speaker suddenly accused her of intimidating them and being insubordinate. Keyes asserted that she'd never been disrespectful to them, explaining that if she sometimes used a loud voice it was because she was partially deaf and thought she wasn't being heard. She says Thornbirg "ordered" Speaker to write Keyes up for insubordination. She also says that as they left Thornbirg's office, either Clement or Speaker told her, "We'd appreciate it if you kept your comments to yourself at the tailgate meetings and let other people speak. Keep your opinions to yourself." That afternoon Keyes, subdued, said nothing at that day's tailgate meeting.

After the meeting, Speaker gave her a warning (GC Exh. 16) citing rudeness and insubordination. Attached to it was a memo better explaining the overtime issue, but nothing in the warning cited any instance of rudeness or insubordination, only referring to the fact that Keyes had argued and disagreed with the change in hours and in frustration said she would have her lawyer take care of it from there.

Neither Thornbirg nor Speaker testified at the hearing and Clement's testimony was limited to another issue. Even so, I am able to agree with the General Counsel's allegations only in part. I find no warrant to conclude that Respondent changed Keyes's hours for any reason but a desire to comply with the 8 hour doctor-imposed limit and at the same time avoid paying half an hour's overtime on Friday for attending a meeting, where that cost could be avoided simply by moving Keyes' starting time to the same time as everyone else. There is no evidence, except Keyes' suspicion, that Thornbirg's motive here was unlawful. This allegation should be dismissed.

However, with respect to the warning which Keyes says was "ordered" by Thornbirg, I do find a violation. If Thornbirg did authorize it, however, it was probably after having heard her introductory sarcasm. In that sense, he was undoubtedly less inclined to accept her denial of the Clement-Speaker allegations. He certainly was inclined to back them up in any event. The problem is, however, that the only evidence to support the issuance of such a warning is nonexistent. Nothing in the warning slip describes what Keyes did to warrant it. A mere claim that someone is rude or insubordinate does not make it so. In the space on the form for the description of the incident, Speaker only referred to the attached statement. Nothing in that statement details what about the arguing, if anything, was regarded as insubordinate. There is no proof that the argument exceeded the bounds of proper behavior. Therefore, I must find that there were no grounds to reach such a conclusion.

The only remaining reason for the warning is the undenied one, that both Clement and Speaker wanted her to stop expressing her opinions in the tailgate meetings. At those meetings, of course, everyone, Clement and Speaker included, knew she was the employee leader, knew she was the chief union organizer and knew that her opinions carried weight with the employees. In fact she was often asked by some of the Spanish speakers to present their views on matters. Those employees had difficulty understanding the call-in rule for illnesses as well as the vacation pay rules; at least one complained about the way Clement addressed him. Keyes had spoken up on most of these issues.

Rather obviously, Clement and Speaker wanted her to cease playing that role so they could get on with their (unlawful) job of soliciting employee grievances to undermine the Union's organizing effort. Keyes was perceived as a threat to that purpose and the warning went hand-in-hand with the demand that she keep quiet during the tailgate meetings. It was a coordinated effort to shut her up.

Since Keyes was clearly acting on behalf of the entire group when she spoke at the tailgate meetings, the attempt to silence her violated Section 8(a)(1) as it interfered with, restrained, and coerced her and others in their attempt to concertedly mutually aid and protect one another. *Jennie-O Foods*, 301 NLRB 305 (1991). The warning also violated Section 8(a)(3) as it affected her tenure of employment. *Litton Microwave Cooking Products*, 300 NLRB 324, 325 (1990).

D. The Representation Election; Aftermath

On September 24, 1997, the Board conducted a representation election pursuant to the petition, which had been filed in July. The Union won the election, but on October 1, Respondent filed objections. Specifically, one of those objections asserted that the election had been unfair because 19 of the employees who had voted who were ineligible to work in the United States due to their immigration status. According to Respondent the election outcome had been distorted and did not reflect the true sentiments of a majority of the bargaining unit. On that day, it said, it had terminated those 19 employees (actually only 11 employees) because it had discovered that their claim of eligibility to work in the United States was flawed.

Eight days later, on October 9, Respondent reversed its field and withdrew the objections. That same day, the Board certified the Union as the Section 9(a) exclusive collective-bargaining representative of Respondent's employees in the voting unit.

[4] In her Board affidavit, however, Keyes seems to show a clear understanding of the reasons given: "Around August 27th, 1997, Lily informed me that the company was changing my hours from 7 [a.m.]—to 3:30 p.m. beginning the next day so I could attend any staff meetings without being paid overtime."

While the certification itself is not under challenge, two types of complaint allegations are presented resulting from the Union's majority status. The first type is the apparent layoff or discharge of the employees on October 1. The second involves breaches of the obligation to collectively bargain, such as bypassing the bargaining representative or making unilateral changes without first bargaining with the Union.

Respondent's Invocation of Immigration Duties as an Excuse to Invalidate the Election

Respondent's general manager, Jackson, testified that shortly after the Union had won the election, some displeased employees told him the election had been unfair because of the number of "illegal aliens" who had vote.[5] He advised the employees that he was unaware of any illegals and even if there were any, he could take no steps until he found out who they were. He would not go on a fishing expedition. Shortly thereafter, he says, he found on his desk a paper with a handwritten list of employees with Hispanic surnames. He concluded that the paper named the illegal aliens in Respondent's employ. The list has since disappeared.

He immediately spoke to Wendy Swinson, an accounts payable clerk who normally helped with the I–9 documentation. He showed her the list and asked her to pull some of the files. He says he determined that the very first one he pulled had a suspicious social security number. Later, according to Sally Punkar, the human resources director (who never saw the list), she and Jackson went over some of the files to demonstrate that the paperwork was entirely in order. Whatever their concerns may or may not have been, Jackson directed Swinford to contact the Immigration and Naturalization Service to find out the appropriate procedures to follow. The INS official advised them of certain number sequence ranges on alien registration forms, which were presumptively valid. A review of the I–9 forms with those ranges in mind, led Jackson to the conclusion that eleven employees were likely to have been aliens not authorized to be employed in the United States.[6] Jackson says the INS advice was to confront the employees with this information and tell them to go to the INS office and get their paperwork "squared away."

On Wednesday, October 1, Punkar called the 11 employees to a meeting and told them, through a translator, that they had to contact the INS immediately and that on Friday, October 3, they should let her know what process was taking place. In the meantime, they could not work.

Respondent, of course, had not discussed with the Union what it was doing nor what its procedures might be in the event that employees might need assistance with the INS. The next day, some of those 11 employees came to pick up their paychecks, accompanied by the Union's Bob Miller and a union staff attorney named Mark Kyle. They attempted in vain to try to work out the problem and the matter became heated. They left when Respondent called the police.

On October 7, Miller met with Jackson again. According to Miller, this meeting was much calmer. They had a discussion about the matter and Miller suggested that if the 11 employees were reinstated with backpay that the Union would withdraw its unfair labor practice charges on the subject. Miller says Jackson opined that perhaps he had been given some erroneous legal advice about the entire INS matter and said he would get back to Miller about his proposal. Miller recalls Jackson saying that the only reason the Union had won the election was because Respondent hadn't fought and what had really angered him was the "ungentlemanly" way the Union had conducted itself during the March on the Boss.

Two days later, Respondent withdrew its objections to the election. It is unclear whether any employee was actually discharged during this incident. No affected employee testified, yet some of the employees' October 7 paychecks were marked "final check," with the last day of work being shown as October 1. Even so, both Jackson and Punkar testified nobody was discharged. However, on October 8 and 10, Respondent wrote letters, first in English, then in Spanish, to the 11 employees notifying them that they could return to work on October 14. The letters asserted that they were doing so because of unclear INS rules and advised them to notify Punkar by October 13, whether they planned to return. It appears to me that the letters qualify as an admission of party opponent that the employees were "discharged."

Moreover, those discharges would appear to rather easily fall into the category of a violation of Section 8(a)(3). Respondent was clearly looking for a way to undermine the validity of the NLRB election and chose an Immigration route to do it. Thus, even though Respondent has an obligation imposed on it by law to maintain a work force which is eligible to work in the United States, as mandated by the Immigration Reform and Control Act of 1986, it may not use that law, or any law to shield activity which is discriminatory under another statute such as the NLRA. The real reason for its invocation of IRCA here was to look for a way to set aside the election and thereby avoid dealing with the Union. Thus Respondent's treatment of these eleven employees violated Section 8(a)(3).

Respondent nonetheless argues that the individuals were not discharged despite the notes on the timecards and the subsequent letters. Section 8(a)(3) of the Act, quoted below in pertinent part,[7] prohibits discrimination relating to the "tenure" of an employee and is not limited to discharges. Rather clearly Respondent's treatment of these 11 employees raises a "tenure" issue. If employees lost pay during this time, it was for a reason prohibited by the Act, thereby calling for the invocation of Section 8(a)(3). It is certainly sufficient to warrant the remedial authority of Section 10(c). If, during the compliance stage it is determined that no employee lost any pay, then so be it, but such a finding would not affect the conclusion that that their "tenure" had been affected by the conduct. It seems to me, however, based on the language of the recall letters, that these individuals did lose time

[5] The employees Jackson listed were Luis Vasquez, Bill Heidbreder, Gary Allen, and perhaps Chris Mann.

[6] Those individuals were: Juan Campos, Luis Casillas, Rigoberto Contreras, Lazaro Gomez, Imelda Gonzalez, Carlos Guzman, Martha Herrejon, Ricardo Ramirez, Luis Rodriguez, Veronica Rodriguez, and Beatriz Saavedra.

[7] Sec. 8(a)(3): "It shall be an unfair labor practice for an employer —by discrimination in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage union membership in any labor organization."

and connected wages; otherwise there would have been no reason to call them back to work.

What actually happened seems rather clear. Respondent, naively I think, believed it could avoid the consequences of the Union's winning the election by proving it had unwittingly employed persons ineligible to work in the United States. Jackson thought that if persons were not permitted employment, they would not be permitted to vote even if they had become employed contrary to law. That naiveté did not take into account the fact that the NLRA's definition of "employee" does not concern itself with matters under the Immigration and Nationality Act and its amendments. If a person is an employee under the NLRA, he or she is entitled to its protections and to exercise the rights it grants, including the right to vote in a representation election. *Sure Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

At some point that logic was presented to Jackson and he realized Respondent could not sustain its initial effort. As a result he attempted to backtrack. But the damage was done.

E. Keyes and Jara's Suspensions

A few weeks after the certification of representative was issued in favor of the Union, the collective-bargaining process began. The first meeting was on November 20. Although the union team was led by the union officials themselves, they were assisted by a committee of employees, including Alice Keyes, Antonio Mendez, and John Heneghan. The Union's policy is to reimburse employees for lost pay for time spent in negotiations, and to document such expenditures it asks employees to fill out a "timecard" to demonstrate the time spent and the purpose of the payment. In the early morning of November 21, Union Business Agent and Organizer Francis "Scooter" Gentry went to the company parking lot to obtain the signatures of the three committee members on such cards. He successfully obtained signatures from Keyes, Mendez, and Heneghan. That incident became part of a later scenario involving an accusation that Jara had punched Keyes' company timecard, contrary to a company rule.

Later, at the end of the day on November 21, Respondent conducted a tailgate meeting. A few days before that meeting was conducted, Keyes, in her role as spokesperson for the Spanish speaking employees, had been asked to by two female employees (Ubias and Gonzalez) to look into why their requests to be seen by the company doctor were being ignored while male employees were promptly seen. At the meeting she raised that complaint. Both Clement and Speaker claimed ignorance; Jara pointed out that it was Clement's responsibility to track the injury reports and Gonzalez reminded Clement that a report had been made which had been deflected by a claim of a lack of transportation. In addition, Speaker, to whom at least one of the incidents had been reported, had neglected to follow through. As a result both he and Clement found themselves embarrassed and on the defensive. The meeting was heated and finally ended with Speaker agreeing to take the two employees to the doctor the next day, a Saturday.

On the following Monday, Human Resources Manager Punkar called Keyes and Jara individually to the office and told them that they were under investigation for timecard abuse. She told them that the previous Friday, November 21, Jara had been seen punching Keyes' timecard and putting it into the rack. She gave them a copy of the policy (R. Exh. 4) and advised that an investigation was underway." She asked each of them to submit a written version of what had happened.

The policy, found in a welcome letter to new employees, describes the computerized KRONOS time tracking system, but counsels new hires that "it can't prevent an employee from clocking in for another who is either late for work or absent for the day. In this regard, it is necessary that you understand the seriousness of such an action. The consequence for anyone found falsifying company records will be termination of employment. . . . There will be no exceptions to this company policy."

A great deal of evidence was presented regarding the incident: who saw what, where people were at the time, whether the witnesses held an antiunion bias against Keyes or Jara, whether the investigation conducted by Assistant Manager Buckle was predetermined and whether union official Gentry's inability to corroborate Keyes was meaningful. The upshot of the Company's investigation was its conclusion, first (on November 28) to suspend the two pending further investigation and finally culminating in converting it to a 2-week suspension without pay.

I find it unnecessary to address the various versions of the facts surrounding the incident. They are confused and subject to a wide range of possible credibility findings, none of which is entirely satisfactory. Instead, I shall accept the findings of fact most favorable to Respondent but conclude that the rule was not, and could not reasonably have been interpreted to have been violated. Since the rule was not violated, it follows that the only reason for the suspensions which were levied on Keyes and Jara were their union activities and/or their concerted protected activities during the November 21 tailgate meeting.

The version of the facts accepted by General Manager Jackson when he determined to suspend Keyes and Jara for supposedly violating the rule is: Employee Heidbreder observed Jara placing two punched timecards in the rack, her own and that belonging to Keyes. According to Heidbreder, Keyes was still out in the parking lot talking with Gentry at the time the cards were simultaneously punched at 6:53 a.m. That distance was such that Keyes could not have walked to the timeclock in the same minute. Even so, work did not start until 7 a.m., and the evidence shows that both women were on the floor at that time and worked as scheduled. Respondent acknowledges that no time was stolen; indeed that is the explanation for not firing the employees; it was considered a mitigating circumstance.

Now, while common sense may tell us that employees are not supposed to punch in for one another and that an employee may not help another employee steal time, the rule these employees supposedly violated here does not bar what Respondent says they did. First, it only bars an employee from punching in for another employee who is late or absent. It does not bar an employee from punching in for an employee who is not stealing time through falsely claiming to be present. This card was punched 7 minutes before starting time and both were on the floor at starting time. Indeed, it would have been easy for Keyes to get to the sorting floor in that amount of time whether she was in the lobby next to the timeclock or whether she was in the parking lot at 6:53 a.m.

Second, the rule prohibits falsifying company records. Even if Jara punched Keyes's card, I am at a loss as to what company

record was falsified. The only record that mattered was whether an employee began work at 7 a.m. or not. Assuming Jara did punch Keyes' card, the record is nonetheless accurate. Both began work when they should have.

Furthermore, it is not as if my analysis is in the face of a company enforcement policy to the contrary. There is evidence in the record that other employees have done the same thing with management's knowledge without any punishment having been rendered. Both Clement and Willette had reported similar, and repeated, circumstances involving employees Dwinger and Tapia in the past. Clement once told both Keyes and Jara that she was tired of reporting the frequency that such incidents occurred because nothing was ever done about it. It is my conclusion that nothing was done about those incidents because they were deemed to be unimportant and not a violation of the rule, for it is likely that no time was stolen there either. Both these individuals later became supervisors.

Thus, I am left with the fact that the rule did not prohibit what Jara and Keyes are accused of doing and that Respondent had not interpreted the rule in that fashion until Jara was reported by Heidbreder. That circumstance raises the question of why Respondent would treat Jara and Keyes as they did. If they had committed no breach of the rule, why were they punished?

There is, it seems to me, only one possible answer—they were singled out because of their union organizing, Keyes' being on the negotiating committee and because they engaged in protected activity in support of their fellows during the tailgate meetings, particularly the previous Friday. That being the case, the General Counsel has made out violations of both Section 8(a)(1) and Section 8(a)(3) with respect to the suspensions of Keyes and Jara.

F. The Union Protests the Keyes/Jara Suspensions

By letter faxed to Jackson on December 1, the Union's Bob Miller asserted that the suspensions of Keyes and Jara was a retaliation for their union activities and was an unfair labor practice. He demanded their immediate reinstatement. Shortly thereafter, the union committee decided to hold a meeting with the employees to decide what to do. A meeting was arranged for 6:30 a.m. before work on December 4. Four union officials attended, including District Representative Frank Herrera, who led the meeting. The employees decided that they would not go to work until they could speak to Jackson about reinstating the two. They immediately began picketing the facility with signs demanding "Reinstate Alice and Olga."

The first manager on the scene was Buckle. He advised that Jackson would not be in until later and professed to have no knowledge of how Respondent was treating the two. When Jackson finally arrived, both Miller and Herrera attempted to speak to him. Jackson put them off for a while. During that delay, he called a temporary employment agency called Labor Ready and asked for 20 people. He learned that they could supply him with only 15.

Jackson finally met with the union officials who asserted that the suspensions were unlawful and demanded that Jackson reinstate the two. Jackson replied that he would not do so, "they had committed serious violations company rules and were lucky they hadn't been fired."

Herrera describes what happened after Miller asked Jackson to reinstate Keyes and Jara:

> [HERRERA] And he [JACKSON] said, "Absolutely not."
>
> Q. [By MS. BRENNER]. Okay. Did you respond to that?
>
> A. Yeah. And I says, "Okay. If that's your final word we'll go back to work right now. We'll pull the pickets and we'll go back to work today."
>
> Q. All right. And did Jackson reply to that, Mr. Jackson?
>
> A. He said, "Absolutely not." He says, "You folks think you can pull the—pull these job actions on us anytime you want? You're going to have to pay the consequences and there's no way they're going back to work today."
>
> Q. Okay. And then—so, what did—did Jackson respond to that?
>
> A. Then Bob—then Bob said, you know, "Let me get this straight now. We've indicated to you that we're here to protest the suspension of Alice and Olga. And you've indicated to us—you've indicated to us that you are refusing to put them back to work today."
>
> Q. Okay. Then what happened?
>
> A. He kind of looked up in the air, hesitated for a while, then he said—he stated, "If you," he says, "If you can guarantee to me that you won't pull anymore of these shenanigans and drop all the NLRB charges I might consider putting them back to work today."
>
> Q. All right.
>
> JUDGE KENNEDY: I might consider it?
>
> THE WITNESS: I might consider it.
>
> Q. By Ms. BRENNER: And was there any response from the Union on this?
>
> A. Well, he excused us.
>
> Q. Well, did the Union accept that? He made the proposal. What did the Union say?
>
> A. Oh, that's right. And then Bob stated—Bob stated, "There's no way we can guarantee that we're no more—that we're not going to do anymore job actions and we're not about to drop the NLRB charge."
>
> Q. So, did Mr. Jackson—what did he say to that?
>
> A. That's when he excused us and he says, "Will you gentlemen step out? I've got to make some phone calls. I'll get back to you."
>
> Q. All right. And then what happened?
>
> A. We went back out to the lobby. The picketers were still in the lobby. And Bib [sic] had told them everything that had transpired in that meeting, the picketers and the workers.
>
> Q. Okay. And then what happened?
>
> A. Well, we waited and we waited for them to come back out and he told us to wait out in the lobby, so that's what we did.
>
> Q. All right. And then what happened?
>
> A. I don't know. Ten minutes, 15 minutes, Jerry Jackson came back outside and invited us back in the office.
>
> Q. Okay. And what happened then?

> A. He told us, he said, "Hey, they're not going back to work today. No way." He says, "If they're here on time, ready tomorrow, 7:00 a.m., they can go back to work."

Jackson's testimony varies only slightly. He says that he told the Union that if it would "consider" dropping the unfair labor practice charge he would "consider" taking a payroll hit from Labor Ready and let the employees go to work. His use of the word "consider" in that context seems equivocal at best. As quoted above, Herrera puts Jackson's use of the word in a different context: "If you can guarantee to me that you won't pull anymore of these shenanigans and drop all the NLRB charges.[8] I might consider putting them back to work today."

Jackson's phraseology suggests an attempt to negotiate a settlement—under his view it was an opening gambit. (*I'll consider this, if you'll consider that.*) Herrera's recollection describes a demand for capitulation in exchange for even "considering" allowing the employees to go back to work.

Of the two versions, I think the more probable, based on demeanor and overall circumstance, is Herrera's. Jackson refused to meet with the union officials when he arrived at work, instead immediately trying to obtain replacement workers. He was more concerned with responding to the job action with power than he was with determining what the Union's intentions were. Had he had the conversation before ordering the temps, and had it gone the same way as it no doubt would have, the Union would have requested that they all return in circumstances where the temps had not been called. Thus, I believe Jackson was more interested in exacerbating the circumstances than with trying to resolve them. He wanted to put temporary replacements into play in order to make the employees "pay the consequences" for their action.

In general, of course, it is not unlawful to operate a business in the face of a strike, even a strike to protest unfair labor practices. Nevertheless, unfair labor practice strikers have greater rights to reinstatement than do ordinary economic strikers. *Mastro Plastics Corp. v NLRB,* 350 U.S. 270 (1956). The employer must reinstate them promptly upon their having made an unconditional offer to return and if it does not do so, backpay commences immediately, allowing for a 5-day grace period unless there are circumstances, which warrant the grace period being rendered inapplicable. The grace period is longstanding, dating back to 1938. See *Drug Package Co.,* 228 NLRB 108, 113–114 and 121–122 (1977),[9] for a thoughtful discussion between a Board majority favoring maintaining the grace period and a dissent which wished to eliminate it. The colloquy recites the historical development and need for the grace period, recognizing that employers who have hired replacements in unfair labor practice strikes need a reasonable amount of time to carry out administrative details in the recall process.

In this case, the General Counsel relies on Herrera's testimony to argue that Respondent has forfeited its right to wait until the next day (the grace period) before allowing the unfair labor practice strikers to return.

[8] The original charge in Case 20–CA–28057 had been filed on October 2.

[9] Enfd. in relevant part 570 F.2d 1340 (8th Cir. 1978).

The Board's standard order regarding the reinstatement of unfair labor practice strikers includes: "The Board has found that the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. Accordingly, if Respondent . . . has already rejected, or hereafter rejects, unduly delays, or ignores any unconditional offer to return to work, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work." Modern cases applying this rule include, *Drug Package*, supra; *Newport News Shipbuilding*, 236 NLRB 1637 (1978), enfd. denied on other grounds 594 F.2d 1203 (8th Cir. 1979); *National Car Rental Systems*, 237 NLRB 172 (1978); *Canterbury Villa*, 273 NLRB 1196 (1984); *McCormick-Shires Millwork*, 286 NLRB 754 (1987); *National Football League*, 309 NLRB 78, 83 (1992); *Grondorf, Black, Field & Co.*, 318 NLRB 996 (1995); and *La Corte ECM, Inc.*, 322 NLRB 137 (1996).

Counsel for the General Counsel argues that there are two reasons why the grace period should be disallowed. First, she asserts that the proposal to withdraw the unfair labor practice charge was an unlawful proposal under Section 8(a)(4) of the Act, citing *Amsterdam Wrecking & Salvage Co.*, 196 NLRB 113 (1972), enfd. 472 F.2d 153 (2d Cir. 1973). Second, she asserts that putting conditions on returning unfair labor practice strikers is also a ground for disallowing the grace period. Again, she looks to the request that the charge be dropped. In addition, Jackson added a second condition; he said he wanted a guarantee that there would be no more job actions.

I start first with an observation made by the Supreme Court in *Mastro Plastics Corp. v. NLRB,* supra. The Court rejected an employer's argument that a narrow reading of Section 13 of the Act was appropriate.

Justice Burton, speaking for the Court, in looking at that provision said:

> It is suggested that 13 of the Act, as amended, precludes reliance by the Board upon the Act for support of its interpretation of the strike-waiver clause. That section provides that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151, 29 U.S.C. 163. On the basis of the above language, petitioners claim that because the contract-waiver clause prohibits all strikes of every nature, nothing in the Act may be construed to affect the "limitations or qualifications" which the contract thus places on that right. Such a claim assumes the point at issue. The Board relies upon the context of the contract and upon the language of the clause itself, rather than upon the statute, to define the kind of strike that is waived.
>
> As a matter of fact, the initial provision in 13 that nothing in the Act "shall be construed so as either to interfere with or impede or diminish in any way the right to strike" adds emphasis to the Board's insistence upon preserving the employees' right to strike to protect their freedom of con-

> certed action. Inasmuch as strikes against unfair labor practices are not anywhere specifically excepted from lawful strikes, 13 adds emphasis to the congressional recognition of their propriety. [350 U.S. 270, 283–284.]

Thus, the Court has expressly stated that the right to strike in protest of an employer's unfair labor practice is so strong that it may not easily be considered waived, even in the face of a no-strike clause. Indeed, it is one of the paramount rights employees have to protect themselves and their rights under the Act. Section 13, in Justice Burton's words, "adds emphasis" to the Congress' recognition of the right.

If the right to strike is so strong then, and unfair labor practice strikers have the right to return to work immediately on their unconditional request to do so, what impact did Jackson's words have on that right? He put the employees' very right to protection under the Act in play. He said, "in effect, if you give up your right to have your unfair labor practice charges vindicated, I'll *consider* letting you come back to work." He also said, in effect, that they had to give up the right to strike in the future for him to *consider* allowing them back.

These strikers had the right to be immediately reinstated. When Jackson imposed these conditions on their right to reinstatement, he was stripping them of rights guaranteed them by the statute. See *Brooks, Inc.*, 228 NLRB 1365 (1977), enfd. in relevant part 593 F.2d 936 (10th Cir. 1979); *Caterpillar, Inc.*, 322 NLRB 690 (1997), unrelated issue clarified 322 NLRB 920 (1997). In addition, if that condition deprived employees of their right to access to the Board, it violated Section 8(a)(4) of the Act. That section, of course, makes it unlawful "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act." See Trial Examiner Josephine Klein's remarks and holding in *Amsterdam Wrecking & Salvage,* 196 NLRB 113, 115 (1972), and the cases cited therein where the point was saliently made.

Rather clearly, then, Jackson did not give proper deference to the employees when the Union unconditionally sought to put them back to work. The conditions which he imposed, including the unlawful one, leads only to the conclusion that Respondent is entitled to no grace period. Instead these employees are entitled to backpay from the time Miller asked that they be reinstated until they returned to work the next day. That Jackson did not recognize them as unfair labor practice strikers is simply irrelevant. His obligation was to accept them back on the spot without conditions or make a truthful showing that administrative considerations justified the need for the grace period. He did neither, instead seeking to impose conditions, which would delay their return.

G. Keyes' Reassignment of January 28, 1998

Three weeks after she returned to work after having been (unlawfully) suspended, Keyes' assistant team leader, Carl Speaker, told her that Assistant General Manager Larry Buckle had given him instructions to tell her to speed up her work. She reminded him that she was awaiting surgery and wouldn't be able to improve her speed until after she recovered from that procedure. He seemed to remember her circumstances and apologized. He later advised Buckle who was relatively new to the Company, having arrived in late September 1997, of her situation.

Keyes' health circumstances did present a problem to Respondent. In October 1996 she had suffered an industrial injury to her shoulder while on the sorting line. It was diagnosed as a shoulder strain, elbow tendonitis, and left neck strain. She also developed carpal tunnel syndrome in both hands and the consequent difficulty of grabbing items from the line. She had been advised to have surgery on both hands. In May 1997 she had surgery on her left hand and shoulder, but decided to wait until her left side had healed before undergoing surgery on the right side. When she returned to work in late July, she was not at full strength both because she still had not recovered from the surgery but also because the right hand remained untreated. She returned somewhat against doctor's orders, but with a medical restriction of no more than 8 hours' work. As of the time of the hearing, the second procedure had yet to be approved by the industrial injury insurance carrier.

From the time of her return until her reassignment in January 1998, a period of about 5 months, she was sometimes able to use both hands, but was able to perform at only about 50 percent of her preinjury production rate. She also wore removable splints to prevent further aggravation of the conditions. Her physical limitations were well known to her supervision, even if Buckle was not initially familiar with it. After being advised of her circumstances, on January 5 Buckle called her to the office. He advised that that she wasn't meeting the daily quotas, and with her medical restrictions he had decided to move her off the sorting line. She was to work the green waste line and when that line wasn't running to do outside cleanup. Keyes asserted that she was just as fast with one hand as with two, but Buckle replied that wasn't the issue, that it would be best to assign her to work which she could do at her own pace.

She protested that the green waste line was a problem because she had asthma and was allergic to grass and that outside cleanup involved a push broom, which could aggravate her hands and wrists. He told her she would not have use the broom, only her hands. This duty required the employee to work outside with a wheeled trash container and to pick up wind-blown papers and other debris, which collected in the parking lot, along the fence line and other areas.

This combination of assignments produced some truly anomalous results. In the winter the green waste line did not work frequently so she was often outside in inclement weather working with the wheeled cart on muddy grounds using her hands, frequently bending to the ground to pick up items. She found that difficult and obtained a broom, but was told not to use it. She went for several months without a pickup device. She also says that for about 3 months, ranging from 3 to 6 hours per day, Stan Nader assigned her to manually pull nails (using two claw hammers) from used lumber and to stack it. At some point she was taken off the green waste line without explanation. At that point another supervisor, Eddie Tapia, told her that when she wasn't pulling nails, he wanted her cleaning the vicinity. On one occasion, others who were assigned to that task simply bent the nails over; later she was told to remove the bent nails.

At the hearing, Buckle said that it was all a big mistake that the customer who was buying the lumber didn't care about the nails because his equipment cut through the nails. He also asserted that neither he nor the Company had assigned her or any em-

ployee to pull nails.[10] Buckle's testimony on the point borders on the absurd. He claimed it all happened because someone was just showing "initiative." Eventually, the nail pulling became too much for Keyes. She suffered a "bubble" in her elbow and, after being seen by the occupational injury department of the Kaiser Permanente medical center, was assigned to light duty at the truck entrance, the job she was performing at the time of the hearing.

The General Counsel asserts that beginning in January, when Buckle reassigned her, Respondent violated Section 8(a)(1) by assigning Keyes to more onerous duties. I certainly agree that the duties were onerous, but it is a major jump to conclude that they were "more" onerous. Respondent argues, effectively I think, that there are no easy jobs within the plant. All are hard work, dangerous and unpleasant. Each job has a drawback, whether it is on one of the sorting lines or working outside doing cleanup.

I think Buckle's initial decision to reassign her had a motive other than to make her work more onerous. Keyes was mentally tough and not a quitter. He knew that giving her another job would not make her leave. He also knew she was not performing at an efficient speed, a fact which she acknowledges. She could have been left where she was, but she would not have met any reasonable standard of production. The 5 months of convalescence had not seen any dramatic improvement in her physical capability. Something needed to be done. The choices were not good, but some had the advantage of isolating Keyes. Moving her to the green waste line took her from the main sorting lines and away from the employees she was seen as leading. Putting her outside was even better. There she had no contact with any employee. However, the likelihood of reinjury was just as great at those locations as it was with leaving her where she was. Respondent's analysis of the comparative risks to her at each of the locations was nonexistent. Thus, I do not believe the purpose of moving her to the green waste/outside cleanup job was based on reducing the risk of reinjury. I believe it was seen as a move to isolate a principal union activist. In that sense the move succeeded entirely, because Keyes no longer knew what was happening and was unable to see her previous coworkers. She could no longer claim actual knowledge of what was happening inside the plant.

However, at some point a decision was made to take risks with her health. She was directed for a 3-month period to pull nails, an entirely unnecessary task. It was clearly make-work. It involved hand and wrist strength, muscular usage which Respondent knew full well was high risk to someone suffering from carpal tunnel syndrome of both hands and who had had recent shoulder surgery. Buckle's explanation is simply unacceptable. She was not assigned to that duty by accident. Someone ordered her to do the work. If Buckle was as concerned about putting her in tasks where she wouldn't aggravate her physical conditions, he would have taken far more care to prevent what happened. There is little available in the way of a credible innocent explanation. The only real conclusion which can be drawn is that once she had been isolated, she was to be assigned work which would cause her to physically break down. Once that occurred, Respondent would not have to discharge her, she would be forced to leave on disability and it would be rid of her.

I find, therefore, that Respondent assigned Keyes new duties which were intended to isolate her from fellow employees so she would be unable to carry out her union and employee leadership role. That reassignment violates both Section 8(a)(1) and Section 8(a)(3) of the Act. *Montgomery Ward*, 290 NLRB 981 (1988); and *Manno Electric*, 321 NLRB 278, 281 (1996). In addition, directing her to perform an unnecessary task, pulling nails, in an effort to cause her physical disability also violated Section 8(a)(1). *American Ambulette*, 312 NLRB 1166, 1169 (1993).

H. Alleged Breaches of the Bargaining Obligation

It will be recalled that the Union won the representation election on September 24, 1997, and after Respondent's objections were withdrawn it was certified as the exclusive collective bargaining representative of the unit employees. In that context several incidents occurred which the General Counsel alleges breached the statutory duty to bargain in good faith. That duty is set forth in Section 8(d) of the Act which says in pertinent part: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party." The Board, supported by the Supreme Court has held that once a labor organization has become the demonstrated representative of the employees, Section 8(d) prohibits the employer from either dealing directly with its employees or from making unilateral changes in wages, hours, and other terms and conditions of employment. In this regard, the General Counsel's complaint contains several allegations of this sort.

1. Direct dealing

With respect to direct dealing, the facts have previously been discussed with respect to the tailgate meetings which began on August 8. I have previously found that the purpose of these meetings was to improperly influence employees with respect to their union feelings, sentiments and desires. They were in direct response to the Union's demand for recognition of August 5. In the confrontation which took place that day, general manager Jackson told the Union's director of organizing Miller that there was no need for a union, that Respondent was already starting its own union. He said: "I don't need you guys. We don't need you guys. Nobody needs you guys." And he also said, "Let me inform you we already have an internal union started." Three days later, the tailgate meetings began and shortly thereafter, the Nortech Employees Association appeared. At the tailgate meetings supervision began soliciting grievances and complaints with the purpose of remedying those which could be remedied. The

[10] Buckle's testimony:

A. [BUCKLE] I never assigned Alice Keyes to pull nails.

Q. [MS. BRENNER] Okay. When the Company assigned Alice Keyes to pull the nails; is that a better way of stating it?

A. I don't believe the Company ever assigned Alice Keyes to pull nails.

Q. I see. All right. Ms. Keyes just went over on her own and started pulling nails?

A. That's my belief. Yes.

purpose was to derail the employees' interest in the Charging Party. I have found that effort violative of Section 8(a)(1).

However, after the Union won the election, the tailgate meetings continued with the same type of inquiries regarding employee concerns. Grievances were solicited and efforts were made to adjust them. Moreover, no union representatives were invited. Rather simply, by continuing with the tailgate meetings operating in that vein, Respondent gave no deference to the Union's newly acquired status as the employee representative. It was ignoring the Union and attempting to operate without it, dealing directly with the employees instead. This is a classic case of direct dealing in violation of Section 8(a)(5) and (1) of the Act. *Medo Photo Supply Corp. v. NLRB*, 321 US 678, 683–684 (1944); and *Laidlaw Transit*, 318 NLRB 695, 701 (1995), and cases cited.

2. The installation of surveillance cameras

When the building was constructed by the Waste Authority, it was prewired for surveillance cameras. The Authority did not install them, leaving that expense to the lessee, in this case, Respondent. No firm decision to install them was made until after the election. In January 1998 Respondent installed eight cameras, all of which videotaped employees while they worked. Six are on the sorting platform, one in the buy-back area and one in the receiving area. They are all connected to monitors in Buckle's office. The asserted purpose is to review accidents and safe work practices, according to Jackson, but he acknowledges that they could be use to scrutinize employee performance, theft, or personal misconduct.

At no time did Respondent advise the Union that it was going to install the cameras and of course the Union has had no opportunity to discuss the cameras' effects on the working conditions of the employees. There is no doubt that the installation of this equipment without first giving the Union an opportunity to bargain over its usage, violated Section 8(a)(5) of the Act. *Colgate-Palmolive Co.*, 323 NLRB 515 (1997); *Genesee Family Restaurant & Coney Island,* 322 NLRB 219, 225 (1996), enfd. mem 129 F.3d 1264 (6th Cir. 1997). Respondent's argument that it was merely carrying out a long-term plan to install the cameras is unpersuasive.

3. Replacement of safety equipment

Employees who work on the sorting lines wear a hard hat, safety glasses, protective vest, and heavy rubber gloves with a protective liner. Until March 8, 1998, these had all been company supplied. This equipment, particularly gloves, were replaced as necessary. If an employee asked for new gloves he or she was invariably given a new pair. At one point, early in the history of the tailgate meetings, Respondent restricted the policy somewhat by making employees sign for the replacement equipment. That became a bone of contention during one of the early tailgate meetings. Employees also wear steel-toed safety shoes, but it appears that the employees supply their own.

On March 2, 1998, Buckle issued a memo advising that signing for replacement safety equipment would no longer be sufficient—an exchange program was being put into effect. From then on, he said, in order to get replacements, employees would have to bring the worn out equipment to their supervisor who would then provide them with replacements. If the equipment was lost, stolen, or left at home, the Company would no longer replace it without charge. If the old equipment was not turned in, it said the employees would be charged for the cost which would be deducted from the employees' paychecks. Moreover, employees were to begin putting their name on each piece of equipment; if equipment was turned in for replacement which was not marked with the employee's name, it would not be replaced.

A few days later a "Personal Protective Equipment Price List" was posted at the leads' workstation. Gloves cost from $1 to $3.50; safety glasses $6 (lens $4); and hard hats and vests, $10. It is undisputed, however, that at least up to the time of the hearing no employee had ever actually been charged for replacement equipment nor had any pay deductions been levied.[11]

Again, this occurred without notice to the Union, the employee representative. As it affected a term and condition of employment, as well as wages, Respondent should first have bargained with the Union over the subject. It violated the precepts of good-faith bargaining as set forth in *NLRB v. Katz*, 369 U.S. 736 (1961).

4. Sick leave policy

Respondent presented a document (R. Exh. 2), which it asserts sets forth its leave policies and which was supposedly clarified by a memorandum issued by General Manager Jackson on February 27, 1998. Respondent's Exhibit 2 bears no date and is actually headed "Medical Time Policy" but includes such matters as attendance policy, vacation policy, and holidays. Keyes says she has seen it before, recalling that Clement had handed it out at some point. Jackson says a meeting was held concerning the policy in April 1997. Indeed, there is language found in the vacation section which references the fact that some newly hired employees had negotiated their own vacation terms at the time they were hired. One of the provisions in Respondent's Exhibit 2 sets forth a plan by which those individually negotiated terms were to be dissolved in favor of the terms set forth in the policy, on dates when the new hire reached the next level in the schedule set forth there. That fact certainly leads to the conclusion that the policy set forth in Respondent's Exhibit 2 was not in place when Respondent opened for business in 1996 and also for part of 1997. Jackson's testimony seems accurate enough.

That would certainly explain why employees were treated differently at different times and why the ensuing confusion needed to be "clarified," if that is the proper term to describe what happened here.

The problem arose from Respondent's practice of permitting employees to take unpaid leave. For example Keyes, on two occasions, had taken unpaid leave of several days with her supervisor's permission. In May 1996 she had taken several days off when her son was getting married and in July 1997 she says she was allowed unpaid leave to go camping. (The latter was during her recovery period after the surgery, and she appeared uncertain about the year. She may have meant 1996.) She says she took a Thursday and a Friday off without pay.

[11] Such wage deductions are probably contrary to certain provisions of the California Labor Code. See *Cal. Lab. Code Sec. 221.*

Similarly, in October 1997, Jara's father had a heart attack and she took several days off with Punkar's permission. Later, Speaker asked if she wanted to paid for those days off out of her vacation time. She declined and essentially took the time off without pay.

Sometime in early 1998, either January or February, according to Keyes, some of the Spanish-speaking employees began to complain about deductions from their vacation accounts. According to them, if they had used up their sick leave, the company was charging additional lost time against their vacation. Keyes' testimony is in the footnote.[12] Keyes eventually collected pay stub documentation demonstrating the practice and then one morning in February at a safety meeting, she asked Supervisor Dwinger about it. He said he would take it up with Supervisor Tapia.

On February 27, 1998, Respondent issued the "clarification." In its second paragraph it stated: "Each employee has paid vacation and medical time. This time will be used in its entirety for the appropriate purpose *before* a leave of absence without pay will be considered. A leave of absence without pay will be considered *only* under extraordinary conditions." (Emphasis in original.) It then cited examples and announced that such leaves had to be approved in writing at least 2 days before being taken (allowing for the rare possibility that circumstances might require the written request after the fact). There are other details as well.

In comparing this "clarification" with the April 1997 policy, it is apparent that this is an entirely new rule. It does not clarify any ambiguity in the previous rule. Nothing in that policy allowed for deductions from the vacation account as Keyes described and as supported by General Counsel Exhibits 26 and 28. The latter is a Jara pay stub showing the practice in February, while the former shows the practice continuing in May after the clarification with employee Arroyo.

The April 1997 medical time policy does not discuss vacation charges at all. It simply says that medical leave is to be used for illness and medical appointments and that proof may be required in some circumstances. It also describes the rate of accrual of medical leave time (.77 hours per week, amounting to 5 days per year). In the event that an employee with 1 year's experience or more has used his or her allotment of medical leave, the policy provides for an advance of up to 2 days of medical leave time to be earned later. Nowhere does it say that earned vacation time is to be charged when the medical leave time is exhausted. Thus the "clarification" is actually nothing less than the imposition of a new rule.

In fact, there are two types of 8(a)(5) unilateral changes here, though they are closely connected. In neither case did Respondent notify the Union and therefore deprived it of the opportunity to bargain over each of them. The first is the departure from the existing policy prior to the "clarification." During that period Respondent did not follow its own established medical leave policy. At some point it began deducting vacation accrual from the employees' vacation accounts when they exceeded their medical leave account. Second, it changed the leave without pay practice in February when it attempted to codify the deduction practice. Both changes were accomplished without notice to the Union and as they affected wages, hours and terms and conditions of employment, they violated Section 8(a)(5) of the Act. *NLRB v. Katz*, supra; *Our Way, Inc.*, 268 NLRB 394, 415 (1983).

5. Alleged failure to bargain over immigration compliance procedures

I have previously discussed Respondent's discriminatory decision to lay off/discharge employees whom it believed were not entitled to work in the United States. I found that effort, which Respondent canceled after it had begun, to have violated Section 8(a)(3). The General Counsel also argues that the implementation of this effort violated Section 8(a)(5). This theory is grounded in Board law to the effect that layoff procedures are a mandatory subject of bargaining and once a union has obtained Section 9(a) status, an employer may not implement layoffs without first bargaining with the union over those procedures.

Clearly, a layoff of employees effects a material, substantial and significant change in the affected employees' working conditions. *NLRB v. Katz*, supra; *Ladies Garment Workers Local 512 v. NLRB*, 795 F.2d 705, 710–711 (9th Cir. 1986); *Rangaire Co.*, 309 NLRB 1043, 1047 (1992). Accordingly, in a layoff scenario certain requirements must be met in order to observe the good-faith bargaining obligation of Section 8(a)(5) and Section 8(d). Specifically, in *Clements Wire*, 257 NLRB 1058, 1059 (1981), the Board said:

> Although an employer may properly decide that an economic layoff is required, once such a decision is made the employer must nevertheless notify the Union, and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected.

See also *Porta-King Building Systems v. NLRB*, 14 F.3d 1258 (8th Cir. 1994), enfg. 310 NLRB 539 (1993). There an employer, which had opened a new plant on a nonunion basis, relying on a past practice in effect at its older, unionized plant, laid off five employees without notice to the union, although the union had been recently certified at the new plant. The court observed, using that fact pattern as its context, "Layoffs are a compulsory subject of bargaining and therefore a unilateral layoff by

[12] Keyes' testimony:

Q. [By Ms. BRENNER] Okay. And what did the workers talk to you about?

A. [KEYES] That their check stubs—their vacation had been taken out for sick leave.

Q. Their vacation had been taken out of sick leave, can you explain this? I'm confused.

A. They missed the days of—a days work during the week.

Q. Okay.

A. And instead of taking eight hours for sick—the Company taking eight hours for sick pay, the split it up four hours from vacation pay and four hours from sick leave.

Q. Okay. Did—were there any other complaints about how the Company was charging their time off or that was the main concern?

A. That was just the main complaint. That was all they complained to me about.

Q. Did they explain to you why that bothered them?

A. Because at the end of the—when it came time for vacation they weren't going to have any vacation left.

Porta-King violates Section 8(a)(5)." Also see *Ladies Garment Workers Local 512 v. NLRB*, supra.

The principal difference between the cited cases and this one is that here Respondent is purportedly attempting to comply with a law, IRCA, which prohibits employers from employing persons who are not eligible to work in the United States. Therefore, it imposes a duty on employers to determine whether applicants are in fact eligible to work in the United States. That duty is, in its initial form, fulfilled when the employee satisfactorily completes an I–9 form provided by the Immigration and Naturalization Service. The problem arises thereafter, when some fact comes to the employer's attention suggesting that the employee falsified that form (or perhaps a social security number which may or may not have been used on the form) triggering possible criminal or civil liability under IRCA or its parent statute, the INA.

If the employees are represented by a union in that situation, what duty, if any, does the NLRA impose on the employer? It is certainly true that the individual in question is an employee under the Act, *Sure Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and it is also true that there is some likelihood that the employee is actually eligible to work in the United States, despite whatever reasonable suspicion may have fallen upon him or her.

It also seems to me that there is no question that the employee can, if he wishes, obtain the assistance of the Union during this investigation. *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). The real question, however, is whether there is any subject matter over which the Employer and the Union may properly bargain. Since a statute (IRCA) governs the question of whether the employee may be employed at all, there seems to be little which can be done except to comply with the statute. Certainly neither the statute nor the implementing regulations may be bargained away. What is there which a union can really do? Its options may be limited but may certainly assist the employee and in doing so may convince the employer that its suspicions are not well-founded.

Indeed, that is exactly what occurred here. When the employees sought the Union's assistance after they had been told to get their INS paperwork "squared away" the Union did come to their aid and convinced Respondent that its suspicions were unwarranted. It pointed out that their I–9's were regular on their face and that the other material which had given rise to Jackson's suspicions was not sufficient to give rise to a reasonable suspicion. Whether or not Jackson actually accepted that argument, he backed off and reinstated all of the suspect employees.

Thus, the Union's representation of these 11 employees was successful. It appears that Respondent did bargain with the Union (albeit in a naïve and unpleasant manner) to the extent that either party reasonably could bargain on this topic—on meet and consult basis. Indeed, that is about all one could expect would be accomplished during a *Weingarten* style investigation. I suppose a union could negotiate *Weingarten* style language with an employer and even insert such language into a collective-bargaining agreement. Yet the right to such a meeting already exists by virtue of the Supreme Court's *Weingarten* decision. The remaining issues in such an investigation are only whether an illegal employee should remain employed. The answer under IRCA is clearly "no." There is really nothing a Union can do once the ineligibility becomes clear, otherwise, the Union would be negotiating over an illegal subject matter.

Thus, I am forced to conclude that an employer's duty under Section 8(a)(5) to negotiate over layoff procedures concerning IRCA matters exists, but is severely circumscribed. I hold that an employer must only meet and consult with the Section 9(a) union concerning the treatment of a suspected illegal alien employee. I also hold that Respondent did so here and met its burden of meeting and consulting (however reluctantly or unwillingly). This allegation of the complaint will be dismissed.

I. The Crane Incident

At one of the first, if not the first, negotiation meetings after the certification of representative had been issued, perhaps the meeting of November 20, 1997, the parties reached an oral agreement regarding union officials' right to gain access to the plant. According to business agent/organizer, "Scooter" Gentry, the agreement allowed the Union access to the employees if the union official who was visiting first telephoned to advise he was coming and then signed the guest book at the receptionist's window. They were then to be permitted to visit the employees so long as they didn't slow or otherwise interfere with work.

On April 6, 1998, two union agents, Gentry and Union Representative Richard Taliaferro, having first called, arrived at the parking lot in separate vehicles sometime between 9 and 10 a.m. for the purpose of looking that area over in preparation for conducting a rally. They spoke to some employees in the parking lot and then signed in at the desk. After that they went to the lunchroom for a short time and spoke to some of the employees. Having accomplished their purpose, they returned to the parking lot, preparing to continue on to the adjacent landfill operated by Western Placer Recovery. The Union represents employees at that employer.

While in the parking lot, as well as when they drove by Respondent's truck entrance, they could observe that a heavy mobile crane was about to begin work behind the main sorting area. There was a sign on the crane which identified it as a piece of equipment from Valley Crane, another company which has a collective-bargaining contract with the Union. Both Gentry and Taliaferro's duties include not only organizing but also servicing or policing the collective-bargaining contracts which the Union has, as well as checking employees to determine if their dues are up to date.

The two decided to check out the crane on their return from the landfill. In addition, Gentry as a former crane operator was curious about the "lift" which the crane was going to make. He could see a large piece of heavy machinery awaiting the lift. Among other things he thought a picture of the crane performing the lift would add to his personal collection of such feats.

By way of background, the machinery is known as a baler. The County Waste Authority after a legal dispute with Respondent had determined to replace the old baler with a new one. It had contracted with a vendor, Rose Waste Systems, to purchase and install the equipment. Rose, in turn, had hired Valley Crane to help install it. Thus, none of Respondent's employees were involved in operating the crane. These facts, of course, were not known to Gentry or Taliaferro.

The two union officials decided to talk to the crane operator and oiler to see if they really were Valley Crane employees, to determine whether the job was going according to the collective bargaining contract and to see if their dues were up to date.

They stayed at Western Placer Recovery for only a short time. They could see the crane from that location as well. When they left, they went straight to Respondent's truck entrance and drove to within 30 feet of the crane. That location is not open to the public although it is paved and vehicles such as forklifts regularly use it.

Assistant General Manager Buckle had stationed himself nearby to watch the crane at work. He observed the two union officials get out of their vehicle and saw Gentry with his camera. Not knowing what was coming, but aware the two did not have permission to be in that area and were not wearing safety equipment such as hard hats, Buckle went straight to Gentry, asked him what he was doing, told him he was trespassing and had to leave. Buckle said Gentry replied something to the effect that he was there to watch his people.

Gentry's version: "I no more got out of my car and probably took about 10 steps and I was approached by Larry Buckle, who immediately got in my face and told me that I was on private property trespassing and if I didn't leave immediately he'd have me arrested. . . . Buckle had stuck his hand in front of me and would not allow me to take any pictures and continued to tell me that I was trespassing and I was on private property and he'd have me arrested. I asked him—I told him that I had the right to be on the property because I had a signatory contractor in there and I have the right to service my signatory contractors. . . . He told me once again that I was trespassing, I was on private property and he would have me arrested."

Taliaferro's testimony is similar. He said, among other things, that Gentry told Buckle he was trying to service the contract and he had a legal right to do so under Federal law. Instead of listening, Buckle said if they didn't leave he'd have them arrested. Buckle then made a call on his radio. Shortly after that five men came from the plant and surrounded the two union officials. Buckle had blocked Gentry's use of the camera, so he had handed it to Taliaferro. Threats were uttered by some of the men and Taliaferro suggested that it would be better if they left; they did so. They never did talk to the crane operator or the oiler. Moreover, no party cites any provision of the collective-bargaining contract between the Union and Valley Crane as providing a contractual right of visitation. Indeed, that contract is not in evidence. I find, therefore, that the contract does not contain a visitation clause.

The following day, a deputy from the Placer County Sheriff's office called Gentry to advise that charges had been filed. Later Gentry received a notice to appear in municipal court. Neither the nature nor the outcome of that proceeding is before me. Indeed, I did not hear any evidence about it as the complaint here simply asserts that barring the union officials from the premises and threatening them with arrest in this circumstance violated Section 8(a)(1). In that regard, at least one employee, Alice Keyes, observed the entire incident and heard part of it.

In analyzing this matter, the first thing which should be noted is that all parties are in agreement that the original permission which had been granted to Gentry and Taliaferro to come on the premises that morning ended when they left to go to the landfill. Second, no contention is made that they ever had permission to go into nonpublic areas such as the paved area where the crane was working. Had they followed the agreed-upon procedure perhaps this incident would not have occurred. On the other hand, Buckle's response was not exactly reasonable. He either didn't listen to Gentry's explanation or didn't care to hear one. He was angry and perhaps a little scared of what was going on. Gentry's camera did not square with what Gentry was saying regarding checking the dues cards of the crane employees and he was aware of the confrontational style the Union had employed earlier during the March on the Boss as well as the protest over the Keyes and Jara suspensions. Moreover, the two union agents' visit that morning was to survey the area for another similar demonstration. Buckle's suspicions must therefore be regarded as reasonable, even if his attitude was excessively prickly.

The General Counsel relies on *Villa Avila*, 253 NLRB 76, 81 (1980), enfd. as modified *NLRB v. Villa Avila*, 673 F.2d 281 (1982), to support the 8(a)(1) allegation. In that case, which preceded by 10 years the Supreme Court's decision in *Lechmere,*[13] the Board approved Administrative Law Judge Gerald A. Wacknov's conclusion that in the construction industry a nonunion general contractor has no right to bar union business agents from entering a construction site to service the employees of a union subcontractor. Although there were visitation rights clauses in those contracts, neither Judge Wacknov, the Board or the court of appeals was concerned about the contract right. They were looking at the right of access which they believed Section 7 granted, a statutory right. Judge Wacknov said:

> Respondents, by hiring subcontractors to perform work on the jobsites, have thereby invited these subcontractors to, in effect, maintain a temporary place of business on the site, at which locus the working conditions of the subcontractors' employees are necessarily established. It may therefore be reasonably inferred that Respondents, by hiring such subcontractors, thereby "necessarily submitted their own property rights to whatever activity, lawful and protected by the Act," might be engaged in by union business agents in the performance of their duties vis-a-vis these subcontractors who have contractually granted union business agents unrestricted access to the site. [Citation omitted].

In that case, some construction industry unions had been engaged in illegal secondary boycott activity and the primary disputants, the general contractors, feared the visiting union officials (who were from a different union) would resume the tactic and pull neutral employees off the job during critical times such as concrete pours. That situation gave credence to the Employers' claims that they needed to regulate the union officials' conduct while at the site.

The Court of Appeals for the Ninth Circuit agreed, and modified the order to hold that the right of access was not absolute in this situation. It said, 673 F.2d 281 at 284, the order was subject to the following guidelines:

[13] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

> (1) Any visitor can be required to report to the project office and to state in general terms his or her business before being allowed to proceed into the work area;
>
> (2) Union representatives who request permission to conduct legitimate Section 7 business in the work area are presumed to be on . . . legitimate union business until, by their conduct, they indicate the contrary, and
>
> (3) In the event of vandalism, illegal work stoppage or illegal interference with work, the owner or occupier of the worksite may require that the visitor agree to be accompanied by an escort representing the owner or occupier of the premises until after the dispute or disorder has been resolved.

Judge Wacknov's and the court's analyses comported with what appeared to be the law at the time. A balancing of interests was to be applied, Section 7 employee rights vs. legitimate property interests of the employer. In 1992, the Supreme Court in *Lechmere* held that the balancing of interests test was inconsistent with its decision in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956). In essence it noted that Section 7 confers rights on employees, not unions or their nonemployee organizers and that the balancing test is only to be used when the employees are inaccessible and reasonable access infeasible. That holding required the Board to look anew at its access decisions. The Board very recently overruled *Montgomery Ward & Co*., 288 NLRB 126 (1988), a case which had permitted nonemployee union organizers to visit the dining areas of restaurants and to organize employees there so long as their behavior was consistent with that of a customer. *Nick's*, 326 NLRB 997 (1998). It concluded in *Nick's* that *Lechmere* required that the *Montgomery Ward* line of cases to be overruled.

Thus, the question seems to be whether *Lechmere* likewise implicitly requires the overruling of *Villa Avila,* which permits nonemployee union officials to visit property without permission where its members are performing work to see if the collective bargaining contract is being followed. There is one construction industry case post *Lechmere* which suggests it has not been overruled. See *CDK Contracting Co*., 308 NLRB 1117 (1992). In *CDK*, as in *Villa Avila,* a general contractor barred a union representative from entering a jobsite to administer a collective-bargaining contract with a union subcontractor. Here, too, the collective-bargaining contract contained a visitation clause. The Board, dealing with the *Lechmere* defense raised by the respondent, concluded that this presented

> substantially different issues and considerations. . . . At issue here is whether a general contractor may deny access to a jobsite to union officials who seek to communicate with employees of a subcontractor represented by the union where a visitation clause in the contract between the subcontractor and the union permits access. As the judge reasoned, the Respondent, by soliciting other employers to perform work at the jobsite, "invited" subcontractors, and their respective subcontractors, onto the jobsite, and thus subjected its "property rights" to the Union's contractual "access" rights with those subcontractors.

This logic is essentially *Villa Avila* revisited, but now giving weight to the visitation clause of the contract. The Board distinguished *Lechmere* further by observing it involved the "deni[al of] private property access to nonemployee union agents who sought access for the purpose of communicating an organizational message to employees."

Our case, however, does not involve the construction industry, although there are some similarities. Locals of the International Union of Operating Engineers are in general construction unions which commonly represent those employees in the construction industry who operate heavy equipment, including mobile cranes. They do not limit themselves to the construction industry, however. Indeed, the landfill company adjacent to Respondent where the Union also represents employees, Western Placer Recovery, would not appear to be in the construction business. Moreover, Valley Crane's contract with the Union does not authorize union visitation. Indeed, the "invitation" argument found in both *Villa Avila* and *CDK* would not apply because Respondent is not the one who contracted for the installation of the baler. That entity was Rose, a vendor contracted to public body, the Western Placer County Waste Management Authority, the landlord. The Authority was performing plant maintenance work, the replacement of a piece of machinery, which required an installation device often used in the construction industry. To be sure, Respondent wanted the new equipment and had no objection to the presence of the vendor and the crane operator which he had brought to perform the task. However, it cannot be said that it invited Valley Crane to the site or much less invited visitors to speak to the crane employees.

Frankly, it appears that neither Gentry nor Taliaferro had given any consideration whatsoever to the access or safety concerns Respondent, the tenant, might have had. They just barged in unannounced. They did so with full knowledge that they had an agreement with Respondent which not only governed their right to speak to Respondent's employees but which also would have put them onto the property with permission.

Frankly, I do not understand Gentry and Taliaferro's haste here. The crane was not going anywhere any time soon. Was Gentry afraid he'd lose his photograph if he didn't act quickly? If the lift was actually in progress, but he nevertheless went to check the dues cards of the crane employees, wouldn't he have been unnecessarily interfering with that task? In my view, they certainly had the time to return to Respondent's business office to attempt to gain permission. If it had been denied at the point we would certainly have a different case.

Whether or not *Lechmere* in that instance might require overruling or modifying *Villa Avila* in some fashion must remain theoretical. For the incident as it actually occurred, however, I think it is clear that the Ninth Circuit's modifications of *Villa Avila*, now adopted by the Board,[14] remain applicable. Clearly Respondent's rule that visitors to the plant, including union officials, must first report to the office for the purpose of stating their reasons for visiting is an enforceable rule matching the Ninth Circuit's first guideline. Second, it already appears that Respondent permits union representatives into the plant for presumed

[14] *C.E. Wylie Construction*, 295 NLRB 1050 (1989), enf. granted in pertinent part 934 F.2d 234 (7th Cir. 1991); *Subbiondo & Assoc.*, 295 NLRB 1108 (1989); *Mayer Group*, 296 NLRB 25 (1989); and *CDK Contracting*, supra.

legitimate union business. The third guideline (that if some mischief is occurring or has recently occurred, the owner can require the union official to agree to be escorted until that disorder has been resolved) was not tested because the union officials here never reported to the office in the first place.

In that circumstance, I conclude that Respondent did not violate Section 8(a)(1) by barring the Gentry and Taliaferro from a nonpublic area of the plant, even if their purpose was a legitimate one, to conduct proper union business with the employees of an employer bound by a union contract. Respondent only insisted that the union officials abide by a reasonable requirement that they first come to the office to get permission to conduct their business. Safety was certainly a concern if the union officials were to go into a work area and disruption was also a legitimate possibility given the demonstrations which had recently occurred. These issues could have been resolved at the office. Neither Gentry nor Taliaferro complied. This allegation will be dismissed.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily suspended and laid off employees, it must make them whole for any loss of earnings and other benefits, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, as it discriminatorily reassigned Alice Keyes to tasks which caused new injuries or aggravated existing medical conditions, Respondent shall make her whole for any medical expenses she incurred, plus interest, as a result of that reassignment. *Graves Trucking*, 246 NLRB 344, 345 (1979), modified 692 F.2d 470 (7th Cir. 1982). Furthermore, it shall be required to expunge from the affected employees' personnel files any reference to their illegal treatment, whether discharge, suspension or lesser discipline. And, it will be required to rescind any unlawful unilateral changes it made which have been found to violate Section 8(a)(5). Finally, it shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices, which have been found. Because of the serious nature of the violations and because of Respondent's having demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

Based on these findings of fact, legal analyses, and the record as a whole I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act in August 1997 when it instituted the "tailgate" meetings whose principal purpose was to solicit grievances from employees in order to interfere with their desire for union representation.

4. The warning given to Keyes on August 29, 1997, violated Section 8(a)(3) and (1) as its real purpose was to interfere with Keyes's activity for and on behalf of her fellow employees and because she was perceived as a union activist.

5. The discharge of the following 11 employees violated Section 8(a)(3) and (1) of the Act as it was an effort to retaliate against the employees because of the outcome of a representation election and to undermine the validity of that election. Those employees are: Juan Campos, Luis Casillas, Rigoberto Contreras, Lazaro Gomez, Imelda Gonzalez, Carlos Guzman, Martha Herrejon, Ricardo Ramirez, Luis Rodriguez, Veronica Rodriguez, and Beatriz Saavedra.

6. Respondent violated Section 8(a)(3) and (1) when, on November 28, 1997, it suspended its employees Olga Jara and Alice Keyes because of their union activities.

7. On December 4, 1997, Respondent violated Section 8(a)(3) and (1) when it refused to accept the unconditional offer of unfair labor practice strikers to return to work.

8. On December 4, 1997, Respondent violated Section 8(a)(4) and (1) when it asked the Union to drop unfair labor practice charges it had filed as a prerequisite to discussing the return of unfair labor practice strikers.

9. On January 28, 1998, Respondent violated Section 8(a)(1) by reassigning its employee Alice Keyes for the purpose of isolating her from her fellow employees so she could not engage in activity protected by Section 7 of the Act.

10. In February 1998 and for approximately 3 months thereafter, Respondent violated Section 8(a)(1) by assigning Alice Keyes to the unnecessary task of manually pulling nails from used lumber for the purpose of increasing the risk of her injuring herself so that she would be forced to abandon her employment.

11. Respondent violated Section 8(a)(5) of the Act, breaching its duty to bargain in good faith with the certified union, International Union of Operating Engineers, Local Union No. 3 by:

- Directly dealing with its employees instead of Local 3 by soliciting grievances at the tailgate meetings.
- Unilaterally and without notice to Local 3 installing surveillance cameras in the workplace
- Unilaterally and without notice to Local 3 changing the safety equipment replacement policy.
- Unilaterally and without notice to Local 3 changing the sick leave practice and latter the sick leave policy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Nortech Waste, Roseville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Soliciting grievances from employees in order to interfere with their desire for union representation during "tailgate" or other meetings.

(b) Giving warnings to employees intended to interfere with an employee's activity for and on behalf of fellow employees or because the employee is perceived as a union activist.

(c) Discharging employees to retaliate against them because of the outcome of a representation election and to undermine the validity of that election.

(d) Suspending employees because of their union activities.

(e) Refusing to accept the unconditional offer of unfair labor practice strikers to return to work.

(f) Asking the Union to withdraw any unfair labor practice charges as a prerequisite to discussing the return of unfair labor practice strikers.

(g) Isolating any employees so they cannot engage in activity protected by Section 7 of the Act.

(h) Assigning union activists to unnecessary tasks or tasks which unreasonably risk injury, such as assigning an employee with preexisting hand and shoulder injuries to manually pull nails from used lumber, in order to get rid of such an employee.

(i) Breaching its duty to bargain in good faith with the certified union, International Union of Operating Engineers, Local Union No. 3 by:

- Directly dealing with its employees instead of Local 3 by soliciting grievances at the tailgate meetings.
- Unilaterally and without notice to Local 3 installing surveillance cameras in the workplace
- Unilaterally and without notice to Local 3 changing the safety equipment replacement policy.
- Unilaterally and without notice to Local 3 changing the sick leave practice and latter the sick leave policy.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the warning given to Alice Keyes on August 29, 1997.

(b) Make whole the following employees, together with interest as provided in the remedy section of this decision, for their illegal discharges of October 1, 1997: Juan Campos, Luis Casillas, Rigoberto Contreras, Lazaro Gomez, Imelda Gonzalez, Carlos Guzman, Martha Herrejon, Ricardo Ramirez, Luis Rodriguez, Veronica Rodriguez, and Beatriz Saavedra.

(c) Make whole Olga Jara and Alice Keyes for their illegal suspension, which began on November 28, 1997, together with interest as set forth in the remedy section of this decision.

(d) Make whole the unfair labor practice strikers, together with interest, for work lost as a result of Respondent's failure to promptly reinstate them on December 4, 1997.

(e) Make whole, with interest, Alice Keyes for any medical expenses she may have incurred as a result of her being assigned to pull nails in February 1998 and thereafter.

(f) Rescind the changes in working conditions which it made unilaterally without notifying the Union, including the installation of surveillance cameras in the workplace, the safety equipment replacement policy imposed in early 1998, and the sick leave policy changes made beginning in late 1997 as well as the "clarification" of that policy made on February 27, 1998.

(g) Make whole any employee for lost benefits as a result of the unilateral changes found unlawful here.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings, suspensions, or layoffs, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(i) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its recycling plant in Roseville, California, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 8, 1997.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."